Nos. 84-21 and 84-38

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In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM J. SCOTT, PETITIONER

v.

CITY OF HAMMOND, INDIANA, ET AL.

STATE OF ILLINOIS, ET AL., PETITIONERS

v.

CITY OF MILWAUKEE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether federal law has preempted the availability of a suit under the law of one state to abate an out-of-state point source discharge into interstate waters.

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On October 1, 1984, the Court invited the Solicitor General to express the views of the United States in these cases.

STATEMENT

1. The decision of the court of appeals involves three different suits, two by the State of Illinois (and related parties) and one by an Illinois citizen, seeking relief under Illinois state law for out-of-state pollution discharges into Lake Michigan.

a. In 1971, Illinois invoked this Court's original jurisdiction to enjoin the City of Milwaukee and certain other Wisconsin municipal corporations (Milwaukee) from polluting Illinois' shores through the discharge of sewage into Lake Michigan. This Court declined to exercise its original jurisdiction. 406 U.S. 91 (1972) (*Milwaukee I*). The Court explained that the federal common law of nuisance provided Illinois with a remedy for interstate water pollution, and it found that the case should be brought in federal district court. *Id.* at 108.

Shortly thereafter, Illinois (later joined by Michigan (see Pet. App. A4)) filed a complaint for abatement of the discharges in the United States District Court for the Northern District of Illinois, invoking the federal common law of nuisance and also raising two state law claims.[1] Illinois prevailed at trial on "all three counts" (Pet. App. P25). The court of appeals affirmed in part on federal common law grounds. 599 F.2d 151 (1979); Pet. App. J1-J49.[2] This Court reversed, concluding that the 1972 amendments to the Clean Water Act (CWA or FWPCA), 33 U.S.C. 1251 *et seq.*, had displaced the previously recognized federal common law remedy. 451 U.S. 304 (1981) (*Milwaukee II*).[3] The case was remanded to the court of appeals.

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[1] The state law claims were based on the Illinois Environmental Protection Act, Ill. Rev. Stat. ch. 111½, §§ 1001 *et seq.* (1977) (see Pet. App. U1), and Illinois common law.

[2] The court of appeals did not address the state law claims, noting that "it is federal common law and not state statutory or common law that controls in this case" (599 F.2d at 177 n.53; Pet. App. J48 n.53).

[3] Illinois had filed a cross-petition for certiorari addressing the state law issues and seeking reinstatement of the district court judgment. That petition was denied. 451 U.S. 982 (1981).

b. In 1980, Illinois brought suit in Illinois state court against various parties connected with the City of Hammond, Indiana (Hammond) seeking relief for alleged sewage discharges into Lake Michigan. The complaint sought relief on both federal common law and state law grounds. Hammond removed the suit to the United States District Court for the Northern District of Illinois on the ground that the federal common law claim provided federal question jurisdiction. See 498 F. Supp. 166 (1980).

Also in 1980, William J. Scott, an Illinois citizen, brought suit against the City of Hammond in the United States District Court for the Northern District of Illinois alleging pollution of Illinois beaches through the discharge of sewage into Lake Michigan. The complaint sought both injunctive relief and damages from Hammond based on both federal common law and Illinois state law.[4] The district court consolidated Scott's suit with Illinois' suit against Hammond.

Following this Court's decision in *Milwaukee II*, the district court dismissed the federal common law claims. 519 F. Supp. 292 (1981); Pet. App. F1-F12. The court, however, refused to dismiss the state law claims, ruling that the Clean Water Act did not preempt application of state law against an out-of-state

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[4] A third count of the complaint sought relief from the Environmental Protection Agency under the citizen suit provision of the Clean Water Act, 33 U.S.C. 1365. This claim was eventually dismissed by the district court. 530 F. Supp. 288 (1981). The court of appeals reversed that ruling in part; that appellate decision was rendered in a separate appeal that is not the subject of these petitions. See No. 81-2884 (7th Cir. Aug. 16, 1984).

polluter. The court certified its order for interlocutory review under 28 U.S.C. 1292(b), and the court of appeals granted Hammond leave to file an immediate appeal. The appeal of the *Hammond* cases was consolidated with the *Milwaukee* case on remand from this Court (Pet. App. E1-E2).

2. The court of appeals reversed the district court judgments in both the *Milwaukee* and *Hammond* cases (Pet. App. A1-A26), concluding that the Clean Water Act preempted application of Illinois law to out-of-state pollution discharges. The court observed that *Milwaukee I* had relied on the history of federal control over interstate pollution, the sovereign character of the parties, and the need for uniform federal decisions in the area, to announce a federal common law nuisance remedy for transboundary water pollution claims (Pet. App. A9-A11). The court further noted that subsequent appellate and Supreme Court decisions, including *Milwaukee II*, had either suggested or presumed that state law was an inappropriate vehicle for the resolution of interstate water pollution disputes (Pet. App. A11-A16). The court of appeals concluded (*id.* at A16-A17 (footnotes omitted)):

> The very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same ~~some~~ reasons why the state claiming injury cannot apply its own state law to out-of-state discharges now. *Milwaukee II* did nothing to undermine that result. * * * Given the logic of *Milwaukee I* and *Milwaukee II*, we think federal law must govern in this situation except to the extent that the 1972 FWPCA (the governing federal

law created by Congress) authorizes resort to state law.

Turning to the Clean Water Act, the court of appeals observed that the Act sets forth a comprehensive water pollution policy that contemplates active state participation (Pet. App. A18-A19). It noted that the Act grants each state significant opportunities to control discharges within its jurisdiction and also to participate in the decisions concerning controlling discharges outside its jurisdiction (*id.* at A19-A20). The court examined with particular care Section 505(e), 33 U.S.C. 1365(e), which preserves the right to seek relief under common law or another statute, and Section 510, 33 U.S.C. 1370, which preserves state regulatory powers. Weighing the "structure of [the] FWPCA," the Act's "emphasis upon the role of the state where the discharge in question occurs," and the "conflict and confusion" that would result from state injunctions of out-of-state pollution, the court concluded that these provisions preserve *only* the rights of states to police pollution discharges within their own boundaries (Pet. App. A21-A22).

The court denied Illinois' petition for rehearing, modifying a footnote of its opinion but specifically refusing the plaintiffs' request for further proceedings on remand under Wisconsin and Indiana law (Pet. App. B1-B3).

ARGUMENT

Petitioners contend that the court of appeals erred in ordering the dismissal of their claims based on Illinois law. The decision below, however, does not conflict with any decision of another court of appeals and correctly follows the principles laid down by this

Court in *Milwaukee I* and *Milwaukee II*. Accordingly, review by this Court is not warranted.[5]

1. The court of appeals correctly held that federal law preempts the application of the law of one state to abate point-source discharges—from a municipal treatment plant regulated under the Clean Water Act—into interstate waters in another state. See Pet. App. A8.[6] The federal preemption of this application of state law was clearly established by this Court's decision in 1971 in *Milwaukee I*. That case held that federal law alone controls the abatement of interstate water pollution, noting that the "overriding federal interest" in the condition of interstate waters compelled the application of federal law. 406 U.S. at 105 n.6. The Court further explained that the long line of federal statutes in the area of interstate water pollution, beginning in 1899 and culminating at that time with the Federal Water Pollution Control Act Amendments of 1948, ch. 758, 62 Stat. 1155, 33 U.S.C. (1970 ed.) 1151 *et seq.*, had preempted state law. Referring to the 1948 Act's abatement procedure, 33 U.S.C. (1970 ed.) 1160, the Court held that "the Act [made] clear that it is federal, not state, law that in the end controls the pollution of interstate

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[5] Illinois notes (84-38 Pet. 13) that the intermediate appellate court in Illinois has held that state law may be invoked to abate a discharge in another state. These decisions, which do not come from the highest court of the state and which were rendered without the benefit of the views of the Seventh Circuit in this case and of this Court in *Milwaukee II*, plainly do not create a conflict that warrants this Court's attention.

[6] This Court has considered this issue once before in connection with a motion for leave to file an original complaint. *Oklahoma* v. *Arkansas*, motion for leave to file denied, No. 93, Orig. (Mar. 7, 1983) (1982 Term). At the Court's request, the United States filed a brief as amicus curiae in that case.

or navigable waters" (406 U.S. at 102 (footnote omitted)).[7] Accordingly, to the extent common law was needed to fill gaps in the federal statutory scheme (which did not provide Illinois with its own right of action to seek cessation of the pollution), the Court concluded that federal common law should be applied, and therefore it remitted Illinois to federal district court to bring a suit for abatement of the nuisance.

The decision in *Milwaukee I* left no doubt that the law of one state could not be relied upon to abate a discharge in another state. The court of appeals reached that conclusion on remand in the *Milwaukee* case itself (599 F.2d at 177 n.53), and this Court denied certiorari on that issue. 451 U.S. 982 (1981). See also *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1021 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980); *Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1215-1216 (D.N.J. 1978) (dictum). Therefore, the crux of petitioners' contention (see 84-21 Pet. 22-24; 84-38 Pet. 19-20, 23-24) is that intervening events—specifically, the enactment of the Clean Water Act in 1972 and this Court's subsequent decision in *Milwaukee II*—have revived the availability of this state law remedy. This contention is without merit.

In *Milwaukee II*, the Court considered the question whether the enactment of the Clean Water Act in 1972, a considerably more detailed statute than the 1948 Act, "displaced" the federal common law of nuisance that had formed the primary basis for Illinois' suit in district court. The Court held that it

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[7] In a footnote, the Court rejected the "contrary indication" in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971). 406 U.S. at 102 n.3; see also *Milwaukee II*, 451 U.S. at 327 n.19.

had, characterizing the scope of the 1972 Act as "comprehensive" and concluding that it "occupied the field" (451 U.S. at 317). The Court explained that the permit system established by the Act for point source discharges addressed the problems of effluent limitations and sewer overflows that are the focus of this litigation; it concluded that there was no " 'interstice' * * * to be filled by federal common law" (*id.* at 323).

As noted above, *Milwaukee II* did not specifically address the possibility that Illinois could maintain an action under Illinois law for the discharges in Wisconsin since the Court denied Illinois' cross-petition on that issue. See 451 U.S. at 310 n.4. The opinion lends no support, however, to the contention that such state law remedies were revived by the decision in *Milwaukee II*, and, indeed, the discussion there strongly suggests that such remedies are not available. The Court noted that the creation of a federal common law, like that recognized in *Milwaukee I*, is ordinarily premised on " 'a significant conflict between some federal policy or interest and the use of state law' " (451 U.S. at 313, quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)), and further stated that "if federal common law exists, it is because state law cannot be used" (451 U.S. at 313 n.7). Thus, the Court reiterated the premise of *Milwaukee I* that the federal interest in interstate waters precluded the use of one state's law to abate discharges occurring in another state.

This Court's rationale for holding in *Milwaukee II* that the CWA displaced the federal common law of nuisance provides no ground for inferring that a state law action has been revived. The Court explained that the CWA addressed one of the major concerns that

underlay *Milwaukee I* by providing Illinois a "forum in which to protect its interests" through participation in the permit process. 451 U.S. at 325. The Court found that the 1972 CWA "provided ample opportunity for a State affected by decisions of a neighboring State's permit-granting agency to seek redress" (*id.* at 326). Indeed, quite apart from *Milwaukee I*, the Court's conclusion in *Milwaukee II* that Congress intended the CWA to be "comprehensive" and that it "occupied the field" (451 U.S. at 317) provides a strong basis for concluding that state law suits to abate out-of-state discharges are preempted. See, *e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 9.

Illinois contends (Pet. 20, 23) that state law has been revived on the theory that the federal common law that preempted it has now been displaced. That contention is based on a faulty premise, namely, that preemption resulted from something unique about the federal *common law*. *Milwaukee I* held, however, that federal interests and federal law generally (not the federal common law of nuisance alone) left no room for applying state law to abate out-of-state discharges. The decision in *Milwaukee II* that the new federal statutory scheme was so comprehensive that it left no room for federal common law did not alter the basic truth that federal law has preempted state law in this regard. In the words of the district court that has considered and rejected a post-*Milwaukee II* state law claim:

> It would be bizarre to hold that state law claims against out-of-state dischargers were preempted by federal common law but not by the comprehensive federal statute that has in turn preempted that federal common law. Uniformity in

> the interstate regulation of pollution is a concern of the same magnitude whatever form the federal response may take.

Chicago Park District v. *Sanitary District*, 530 F. Supp. 291, 293 (N.D. Ill. 1981) (footnote omitted), appeal pending, No. 81-2896 (7th Cir.).

Moreover, permitting a suit under state law to abate a discharge in another state undermines the policies underlying the comprehensive federal scheme for controlling interstate water pollution. The CWA establishes a "national" pollution control policy (see 33 U.S.C. 1251) that imposes minimum pollution control standards on every state (see 33 U.S.C. 1342). Permitting states to apply their law to abate out-of-state discharges will significantly "impair[] the federal superintendence of the field." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). The CWA creates a federal-state partnership in the area of interstate water quality, but it is a partnership in which the federal role is dominant. The federal government establishes threshold pollution control requirements (see, *e.g.*, 33 U.S.C. 1311, 1312, 1316, 1317), subject to state decisions to "adopt more stringent limitations through state administrative processes, [or] establish such limitations through state nuisance law, and apply them to *in-state* dischargers." *Milwaukee II*, 451 U.S. at 328 (emphasis added). Under this partnership, the states must defer to the federal government's choice of minimum national requirements, but they reserve the unqualified power to determine to what degree they wish to impose more stringent limitations within their borders. If, as Illinois argues, one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed. Where several states are

situated on a particular body of water the state that has the most stringent pollution limitations will displace the federal government as the arbiter of minimum pollution control requirements; this result is clearly contrary to the "full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted).[8]

In sum, *Milwaukee I* clearly established that federal law has preempted a suit under the law of one state to abate an out-of-state discharge into interstate waters. The reasons underlying that finding of preemption remain fully applicable today and, indeed, appear considerably stronger in light of the substantially more comprehensive federal statutory scheme enacted in 1972. Thus, in the absence of any clear indication in the 1972 Clean Water Act that such a state law remedy should be revived,[9] it seems clear

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[8] The Clean Water Act provides a mechanism for states affected by discharges in other states to participate in the permit issuance process and to bring their objections to the attention of the Administrator of EPA. See 33 U.S.C. 1342(b)(3) and (5); *Milwaukee II*, 451 U.S. at 325-326. These provisions would serve little purpose if a state were free to impose its own standards on a neighboring state regardless of whether the second state was complying with a valid permit.

[9] The Clean Water Act, of course, does preserve state law to a limited extent, but, contrary to petitioners' contention (84-21 Pet. 17-18; 84-38 Pet. 24-28), it does not evince an intent to revive the availability of state law to abate a discharge in another state. Section 510 of the Act, 33 U.S.C. 1370, expressly permits a state to set pollution standards more restrictive than the federal standard. This Court has recognized, however, that this authority is limited to discharges occurring within the borders of that state. *Milwaukee II*, 451 U.S. at 328. Indeed, Section 510(2), 33 U.S.C. 1370(2), was adopted from an almost identical provision of the 1948 Act, as amended, 33 U.S.C. (1970 ed.) 1151(c), which the court in *Milwaukee I*

that the court of appeals correctly concluded that federal law continues to preempt the application of state law to abate a discharge in another state. See, *e.g.*, *San Diego Unified Port District* v. *Gianturco*, 651 F.2d 1306, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).[10]

In the final analysis, petitioners' complaint here is largely that the permits that have been issued under the Clean Water Act are inadequate. See Pet. App. A20 n.5. But that dissatisfaction with the permits alone cannot be a basis for permitting petitioners to bring suit under their own state law to abate a discharge in another state. See *Milwaukee II*, 451 U.S. at 324-325 n.18. Rather, any change in the control of the discharge should be made through the system created by the federal statute, either by a change in

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found insufficient to establish an intent by Congress not to preempt state law in this regard. See 406 U.S. at 102. The "savings clause" of the citizen suit provision of the CWA, Section 505(e), 33 U.S.C. 1365(e), similarly does not evince any intent to revive a state law remedy to abate out-of-state discharges. That remedy was plainly preempted in 1971 in *Milwaukee I* and hence could not be "saved" in the 1972 CWA. See *Milwaukee II*, 451 U.S. at 328-330; Pet. App. A21-A24.

[10] This case does not present the question whether, in light of the fact that this Court's decisions in *Milwaukee* concerned only an action to *abate* a nuisance, a state law remedy might remain for *damages* caused by an out-of-state discharge. The *Milwaukee* suit did not seek damages relief at all (84-38 Pet. 4-5). While Illinois' suit against Hammond apparently did seek damages (see Hammond Br. in Opp. 3), Illinois does not appear to have ever argued that its damage claim should be treated differently than its claim for injunctive relief. Scott's claim for damages was rejected, quite apart from the preemption question, on the state law ground that he "has not alleged harm of a kind different from that suffered by other members

the discharge permit or by the application of more stringent controls by the state of discharge.[11]

2. The court of appeals suggested (Pet. App. B3 n.2, A23) that a suit based on the law of the state of discharge would not be preempted by federal law.[12] As noted in our brief (at 14-15) in *Oklahoma* v. *Arkansas*, *supra*, we believe this suggestion to be correct. The Clean Water Act plainly contemplates that a state may hold dischargers *within its borders* to a higher standard than required by federal law, and

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of the public," which the court held was a prerequisite to recovery for a public nuisance (Pet. App. A24-A25). Whether this holding correctly interpreted the Illinois Constitution (see 84-21 Pet. 11) is not a question for this Court. Thus, the petitions in this case do not raise the question whether suits for damages premised upon state law have been preempted to the same extent as suits to abate a nuisance, and we do not address that question here.

[11] Illinois did not participate in the process surrounding the issuance of the Milwaukee permits (Pet. App. A20 n.5).

[12] Petitioners seize upon this suggestion (84-21 Pet. 9-10, 12-16; 84-38 Pet. 11, 15-17) to argue that this is simply a choice-of-law case and therefore the court of appeals should have applied Wisconsin and Indiana choice-of-law rules. Petitioners' contention completely misses the mark. This case is not an ordinary tort suit; it involves the question of pollution of interstate waters, which this Court repeatedly has held to require special treatment. There is not presented a choice-of-law question in the sense considered in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Rather, it is clear that federal law governs (see *Milwaukee I*, 406 U.S. at 105 & n.7; *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)), and state law is preempted to the extent required by federal law. For the reasons discussed above, the federal statutory scheme here has left room for a suit under state law against a discharger in that state, but not in another state.

therefore a suit under state law against a discharger in the same state does not interfere with the federal statutory scheme. See, *e.g.*, *Ancarrow* v. *City of Richmond*, 600 F.2d 443, 445 (4th Cir. 1979).

In light of this suggestion by the court of appeals, petitioners object (84-21 Pet. 8; 84-38 Pet. 16-18) to the court's dismissal order, contending that the court of appeals should either have decided the case itself in accordance with Indiana or Wisconsin law or remanded to the district court with instructions to do so. The court of appeals, on the other hand, evidently believed the plaintiffs should proceed, if at all, by new actions in the state (or states) of discharge. In our view, the correctness of this procedural ruling, which was raised initially on petitions for rehearing in the court of appeals (see Pet. App. B3), presents no issue warranting the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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